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No. 15,792

IN THE

United States Court of Appeals  
For the Ninth Circuit

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FORREST SILVA TUCKER,

*Appellant,*

VS.

UNITED STATES OF AMERICA,

*Appellee.*

BRIEF FOR APPELLEE.

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**BRIEF FOR APPELLEE.**

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**JURISDICTION.**

Jurisdiction is invoked under Title 18 United States Code, Section 3231, and Title 38 United States Code, Sections 1291 and 1294, and it would appear that Title 28 United States Code, Section 2255, and Rule 35 of the Federal Rules of Criminal Procedure may be involved.

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**STATEMENT OF THE CASE.**

Appellant, upon an indictment which charged one count, was tried by jury for violation of 2113(a) and 2113(d) of Title 18 United States Code. The judgment of conviction was entered on May 22, 1953 and sentenced the defendant to a term of 25 years. Ap-

peal was taken from the judgment of conviction to this Court. The Court of Appeals in the case of *Tucker v. United States*, 214 F. 2d 713 affirmed judgment of conviction.

On September 4, 1957 appellant petitioned the Court to vacate his sentence. (R. 6.) Attorney Joseph Murray was appointed by the Court to represent appellant in this proceeding. (R. 25.) On September 25, 1957 the Court, after hearing argument by appellant's counsel and the attorney for the United States, denied the petition. (R. 29.) Thereafter, on October 1, 1957 the Court entered a formal order denying relief under Section 2255 of Title 28 United States Code. Appeal was then made to this Court.

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#### THE OPINION BELOW.

"This case came on regularly for hearing on the Government's objections to hold a hearing pursuant to Section 2255 and on the motion of petitioner, Forrest Tucker, to appear personally at the hearing.

"The court heard argument of counsel, from the government, and from petitioner who was represented by Mr. Joseph Murray who was appointed as his attorney by this court without any objections on the part of petitioner.

"The court being fully advised:

"It Is Ordered that petitioner's motion to appear personally to argue his case is denied, and since the motion and the files and records of the case conclusively show that the prisoner is

entitled to no relief, the motion to revoke sentence under Section 2255 of Title 28 United States Code, is denied.

“Dated: October 1, 1957.

“/s/ George B. Harris  
United States District Judge”

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### ARGUMENT.

Appellant argues that his conviction for aggravated bank robbery was not justified by the evidence. It should be pointed out that Section 2255 involves the collateral attack of a judgment. The proper place to urge the question of sufficiency of the evidence is on appeal from a judgment of conviction. In the instant case appellant appealed from his conviction and the judgment below was sustained by the Court of Appeals. The insufficiency of the evidence cannot be considered by the Court in this proceeding.

Appellant's main argument is directed to the proposition that a 25 year sentence in his case was improper. This Court may not consider the length of a sentence which is within the limits allowed by statute.

*Flores v. United States*, (9th Cir.) 238 F. 2d  
758;

*Brown v. United States*, (9th Cir.) 222 F. 2d  
293.

**CONCLUSION.**

A reading of the transcript clearly reveals that the Court was under no misapprehension as to the defendant's prior record. Aggravated bank robbery, Section 2213(d) of Title 18 United States Code provides for a maximum sentence of 25 years or \$10,000 fine. Appellant's sentence, therefore, was within the maximum provided by law. The sentence is, therefore, beyond the control of this Court.

Dated, San Francisco, California,  
January 24, 1958.

LLOYD H. BURKE,

United States Attorney,

RICHARD H. FOSTER,

Assistant United States Attorney,

*Attorneys for Appellee.*





